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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/598,574

03/19/2007

Roberto Magri

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EXAMINER

CURS, NATHAN M

ART UNIT

PAPER NUMBER

2613

MAIL DATE

DELIVERY MODE

09/03/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No.

10/598,574

Applicant(s)

MAGRI ET AL.

Examiner

NATHAN M. CURS

Art Unit

2613

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 20 August 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 8-19.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/NATHAN M CURS/  
Primary Examiner, Art Unit 2613

Continuation of 11. does NOT place the application in condition for allowance because: The arguments are not persuasive. The applicant argues that while Arecco discloses backup switching, Arecco does not disclose "a second input amplifier configured to generate the compensating ASE noise responsive to a failure of the first input amplifier." This argument is not persuasive because the teaching being applied from Arecco is parallel switched amplifier paths and corresponding backup switching based on faults. The concept of an amplifier providing compensating ASE noise is already provided by the primary reference Caprino; Arecco need not duplicate that teaching. Further, regardless of the specific problems that Arecco was concerned with, the parallel switched amplifier paths teaching is relevant to Caprino since Caprino has an amplifier with no backup.

The applicant also argues that the references teach away, arguing that "any break or degradation in the system of Caprino that would cause an amplifier to generate noise would also cause the switch to a clear transmission line in Arecco." This argument is not persuasive because Arecco discloses backup switching that is based on a fault, not based on noise presence. The applicant appears to be arguing that Arecco defines a fault as noise presence, but this does not reflect Arecco.

The applicant further argues that amplifiers that generate noise are "vigorously discouraged" by Arecco and that Arecco teaches switching from a noisy path to a non-noisy path. This argument is not persuasive because Arecco does not disclose switching based on noise; Arecco's backup switching is triggered by faults. Nor does Arecco "vigorously discourage" amplifiers that output noise, especially for the special purpose that Caprino has in an amplifier maintaining ASE noise output. Further, the use of patents and patent application publications as references is not limited to what the patentees or applicants describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain. The combination as described in the rejections involves applying the concept of backup switching based on fault, drawn from Arecco, to Caprino, it does not involve putting any Arecco amplifiers into Caprino or ensuring that all of Arecco's desires are met. Even so, any "clear path" goal of Arecco, although irrelevant to the rationale of the combination, would in fact be realized in the combination for the situation where Caprino's amplifier fails while there is a normal input preset at the amplifier (Caprino's amplifier is not merely for outputting ASE noise, it merely maintains an ASE output if there is a loss of input). The combination simply duplicates the Caprino-type amplifier in a switched backup path in light of the more general backup switching teaching that one of ordinary skill in the art would have recognized in Arecco. The one would have recognized that backup switching is not tied down to Arecco's particular amplifiers and other concerns.

The applicant further argues that the "second ASE" amplifier of the combination is a "fabrication" based on impermissible hindsight. This argument is not persuasive because it amounts to arguing that the second ASE amplifier must be anticipated. In the rejections, the second/backup amplifier is obvious, not anticipated. There is no impermissible hindsight or "fabrication"; Caprino already discloses an amplifier that outputs ASE under certain conditions, and Arecco shows a switched backup path with duplicate amplifiers. One of ordinary skill in the art would have recognized that to gain the benefit of switched backup for the Caprino amplifier, a second amplifier would be needed.